**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TEXAS**
**SHERMAN DIVISION**

| | | |
|---|---|---|
| BIOSONIX, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | Civil Action No. 4:16-cv-00139-RC |
| | ) | |
| v. | ) | **JURY TRIAL DEMANDED** |
| | ) | |
| | ) | |
| HYDROWAVE, LLC, | ) | |
| RHP INDUSTRIES, LLC, and | ) | |
| T-H MARINE SUPPLIES, INC., | ) | |
| | ) | |
| Defendants. | ) | |

# PLAINTIFF BIOSONIX, LLC'S OPENING CLAIM CONSTRUCTION BRIEF

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## I. INTRODUCTION

This case involves U.S. Patent No.7,333,395 (the "'395 Patent"). *See* Perrone Decl., Ex. D. The '395 Patent issued from U.S. Patent Application No. 11/419,327 filed May 19, 2006, which was a continuation of U.S. Patent Application No. 10/616,402 filed July 9, 2003. The '395 Patent was duly assigned to Plaintiff on December 10 and 11, 2003. The '395 Patent as issued includes 59 claims.

Plaintiff filed this action against Defendants Biosonix, LLC, T-H Marine Supplies, Inc. and RHP Industries, LLC on February 27, 2016 alleging infringement of the '395 Patent. Plaintiff contends that Independent claims 4 (a system claim) and 13 (a method claim) and dependent claims 5, 8, 9, 10, 11, 14 and 15 are infringed by the various Hydrowave H2 Fish Attraction Systems made, used, sold and offered for sale by Defendants. The parties filed their Local Patent Rule P.R. 4-3 Joint Claim Construction and Prehearing Statement on September 15, 2016. [Dkt. No. 57]. On September 19, 2016, the Court entered an Order on Claim Construction Hearing and Tutorial of September 19, 2016 [Dkt. No. 59] in which the parties were ordered to meet in confer in an effort to limit the number of claim terms for construction. On September 28, 2016, the parties filed a Supplemental Joint Claim Construction and Prehearing Statement. [Dkt. No. 60]. A claim construction hearing in this action is scheduled for December 5, 2016.

## II. THE PATENT-IN-SUIT

The '395 Patent relates to an electronic device used by anglers that attracts and stimulates fish, which in turn increases the number of fish caught. The inventors of the '395 Patent are William Henry Lewis and Stuart Randall Flint, who is deceased.

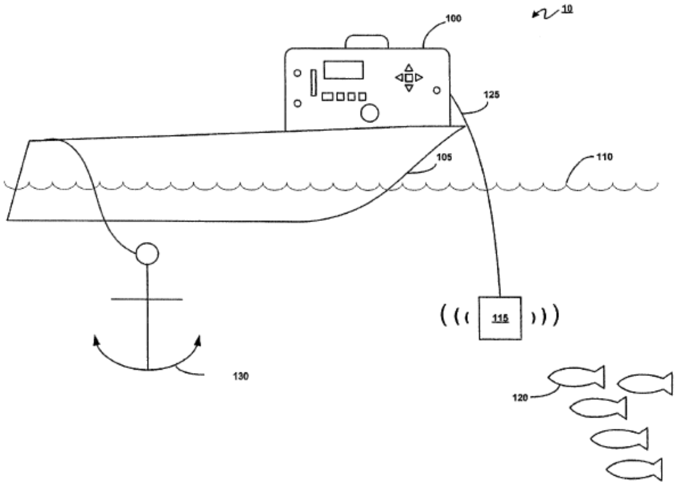
The inventors of the '395 Patent conceived of a novel system for attracting and stimulating fish. The '395 Patent discloses a variety of embodiments of systems and methods that allow a user to make selections through a user interface on a control unit for playing sets of sounds through an underwater speaker. The user may make a selection of sets sounds for playback underwater among a plurality of sets of prerecorded sounds. Through extensive testing and research, the sets of sounds available to the user for selection may be arranged in a sequence and volume level determined to be most effective for attracting and stimulating fish. The embodiments of the '395 Patent include a programmable control unit having a processor and a user interface that allow a user to make selections of custom programs including sets of prerecorded sounds in a sequence and at a specified volume through an underwater speaker.

The user of the system described in the '395 Patent also has the option of entering inputs through the control unit's user interface that set a delay period between the playing of sets of sounds and playing the sound at various volume levels. The user may also pause the playing of the selected sets of sounds and also select sets of the prerecorded sounds for playback in a desired order. The user of the systems of the '395 Patent may make these selections through a control unit. The specification of the '395 Patent describes different exemplary aspects of the patented invention. One embodiment of such a control unit is described in Figure 2A of the '395 Patent

As shown in FIG. 2A of the '395 Patent, an embodiment of the programmable control unit 100 includes various key buttons 215 through which a user may navigate a display 220. Other keys 225 are provided for user selection of various menu items presented on display 200. In the display screen 220, the user is presented with menus for system operation. ['395/ 4:58-5:2].

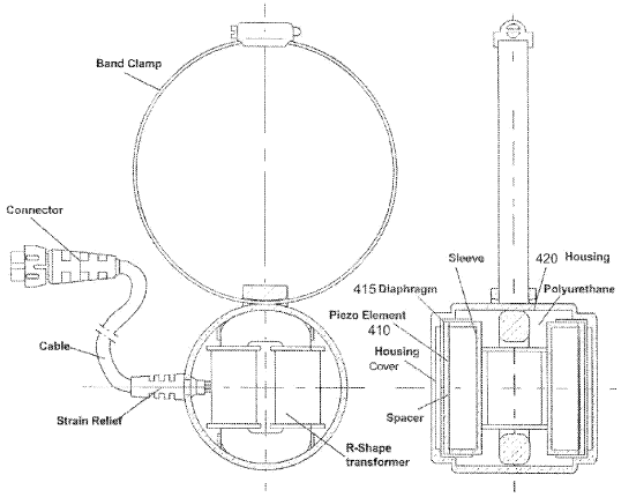
Sounds that may be selected by the user for playback may be chosen from a library of prerecorded signature sounds of certain fish or other species, or of fish being attached and eaten by a predator, or simulations thereof. The sounds and vibrations of predatory fish attaching, crunching and swallowing baitfish trigger aggressive response by other predatory fish, attracting them to the sound source and stimulating them to strike. This is based on the premise that if predatory fish sense competing fish feeding nearby, the predatory fish become stimulated and more aggressive and, hence, more likely to strike an angler's lure. This effect may take place with a variety of gamefish, including bass, bream, crappie and many other fresh and saltwater fish. ['395/ 6:8-20]. The '395 Patent describes playing of the selected custom program that includes sets of prerecorded sounds in a sequence and at a certain volume underwater to stimulate fish activity, which in turn enhances the likelihood of catching fish. A general diagram of an exemplary aspect of the '395 Patent is provided in Figure 1, reproduced below. In the systems and methods of the '395 Patent, the playing of sounds underwater is done via a submersible transducer device, such as a speaker 115. ['395/4:28-34; 10:13-15].

*FIG. 1*



Figures 4A and 4B of the '395 Patent, reproduced below, depict a more detailed view of an embodiment of the transducer device, which in the several embodiments of the '395 Patent is a speaker.

FIG. 4A FIG. 4B


Band Clamp
Connector
Cable
Strain Relief
R-Shape transformer
Sleeve
420 Housing
415 Diaphragm
Polyurethane
Piezo Element 410
Housing Cover
Spacer

As shown in Figures 4A and 4B, the transducer device, which according to the several embodiments of the '395 Patent operates as a speaker, includes various components. ['395/4:28-34; 10:13-29; FIGS. 1, 4A & 4B].

The '395 Patent specification describes different exemplary aspects of the patented invention. Several modes of operation under a custom mode setting are possible. When operating incustom mode, the user may input selections of various options or functions available through the user interface of the programmable control unit for selection of a custom program that includes one or more sets of prerecorded sounds in a particular sequence at a particular volume. The system will play the sets of sounds underwater via an underwater speaker according to the user selections. ['395/15:6-16:62]. The custom programs that the user selects may include factory preset sound sequences pre-arranged and having a volume level for optimal fish attraction and stimulation in various conditions. ['395/15:48-67].

## III. ARGUMENT

This Court is familiar with claim construction principles. *E.g.*, *DSS Tech. Mgmt. v. Intel Corp.*, No. 6:15-cv-130, 2016 U.S. Dist. LEXIS 32157, at *3–6 (E.D. Tex. Mar. 14, 2016). Plaintiff

Biosonix will address specific claim construction canons where they apply.

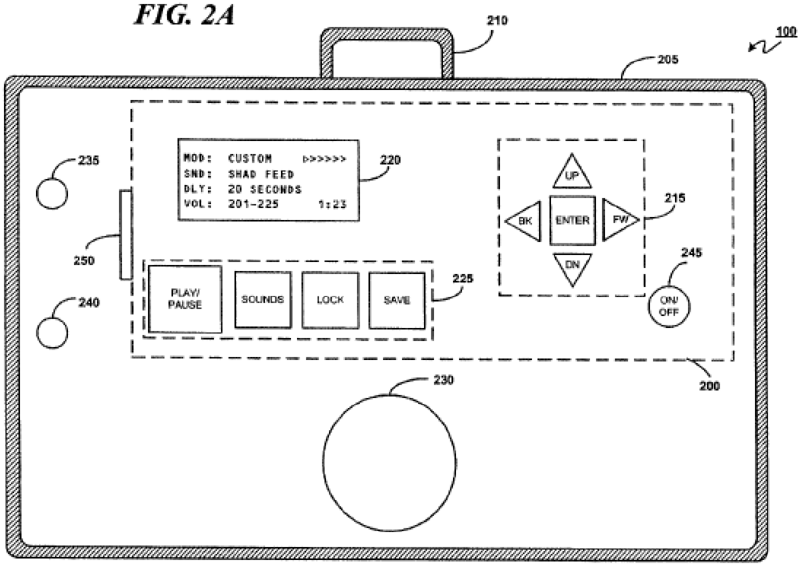
### A. a programmable control unit ('395 Patent – Claim 4)

| **Plaintiff's Construction** | **Defendants' Construction** |
|---|---|
| "a device configured to accept user input" | "a device configured to accept user input to create a customized set of instructions for playing a newly configured custom program."<br><br>For example, a device configured to accept user input to simply play a single, preloaded sound file, from a menu containing multiple sound files is not a "programmable control unit." |

Plaintiff submits that the term "a programmable control unit" means "a device configured to accept user input." This term resides in claim 4 of the '395 Patent, which provides and appears in the element "a programmable control unit operably linked to said submersible device, said programmable control unit comprising:". ['395/20:41-43]. This construction will aid in the Court's and jury's understanding of this term and, unlike Defendants' proposed construction, is consistent with the '395 Patent's intrinsic and extrinsic evidence.

The '395 Patent describes an embodiment of a programmable control unit in various places in the specification including in the connection with Figure 2A, depicted below. The specification describes the embodiment of Figure 2A as a "control panel of programmable unit 100 in accordance with one embodiment of the invention." ['395/4:49-53]. The programmable unit 100 "further comprises various input devices, which may include a waterproof, user friendly keypad…. various keys or buttons 215 may be provided for navigating a display 220." ['395/4:58-61].

*FIG. 2A*



210
100
205
MOD: CUSTOM ▷▷▷▷▷
SND: SHAD FEED
DLY: 20 SECONDS
VOL: 201-225 1:23
220
235
215
UP
BK
ENTER
FW
DN
250
245
240
PLAY/ PAUSE
SOUNDS
LOCK
SAVE
225
ON/ OFF
200
230

Additional keys or buttons 225 may be provided to allow for selection of various menu items shown in display 220." ['395/4:62-63]. The control unit may include menus, such as a main menu, a sound selection menu, a delay selection menu, and a volume selection menu, among others. ['395/5:15-17]. In making a selection of any of these menu items, the user would provide input to the system through the programmable control unit.

Claim 4 recites various components of the claimed programmable control unit, which include but are not limited to a processor, a memory device and an input device. In view of the claim language itself and the specification, a programmable control unit is simply "a device configured to accept user input" as proposed by Plaintiff.

Defendants, on the other hand, contend that a programmable control unit is a device configured to accept user input, but that user input must create a customized set of instructions for playing a newly configured custom program. Defendants go on to provide an example of what a programmable control unit would not be. According to Defendants, a device configured to accept user input to play a single, preloaded sound file from a menu containing multiple sound files is not a programmable control unit. Defendants' attempt to import a negative limitation into the term "programmable control unit" finds no support in in the form of a special definition of the term found in the '395 Patent specification nor a disavowal in the file history of the '395 Patent. To disavow or disclaim the full scope of a claim term, the patentee's statements in the specification or prosecution history must amount to a "clear and unmistakable" surrender. *See Ericsson Inc. v. TCL Commun. Tech. Holdings, Ltd.*, 161 F. Supp. 3d 438, 446, 2015 U.S. Dist. LEXIS 179421, *20 (E.D. Tex. 2015)(citing *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1329 (Fed. Cir. 2009). No such clear and unmistakable surrender of claim scope was made here. Furthermore, the remainder of the language in claim 4 does not lend itself to such a negative construction. Claim 4 recites the various components that comprise the programmable control unit (processor, memory and an input device) and describes the various user selectable options available to the user. The language of Claim 4 itself, however, does not limit those options in an exclusionary way.

Along these lines, Defendants' definition that excludes user input causing playing of "a single preloaded sound file" is also problematic. Nothing in the '395 Patent specification warrants limiting the programmable control unit to a device that may only play certain sound files but not others. Indeed, the '395 Patent describes much in terms of functionality and modes of operation and a construction that excludes various features and modes of operation that a user may select through the control unit would be improper. *See Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1277 (Fed. Cir. 2008) ("[W]here claims can reasonably [be] interpreted to include a specific embodiment, it is incorrect to construe the claims to exclude that embodiment, absent probative evidence on the contrary.").

Moreover, while Defendants' construction of this and other terms include the phrase "sound file", their arguments are premised on a definition of "sound file" that limits the contents of that file to a single, preloaded sound file. Nothing in the '395 Patent specification, however, so limits the term “sound file” in this manner.

Furthermore, nothing in claim 4 requires that a user *create* a customized set of instructions for playing a *newly* configured custom program. Such a construction would exclude an embodiment of the functionality of the system available to the user when operating the system of the ‘395 Patent in various modes. The ‘395 Patent describes a “sound sweep” mode of operation within custom mode that allows the user to select a sequence of sets of sounds for playing via the underwater speaker from among various factory preset sounds. [‘395/15:47-67]. The preset factory settings link multiple specific sounds in sequence for playback. These factory preset sounds are arranged in a sequence and may be set at a volume for playback found to be most effective for attracting and stimulating fish in various conditions and environments. [‘395/15:53-60]

The fact that the user may select in custom mode a sequence of sounds at a particular level for playback that was preset by the manufacturer means that the instructions for playing the custom program do not have to be created by the user and the custom program is not newly configured. Since Defendants propose a construction that excludes an exemplary aspect of the custom mode of operation described in the ‘395 Patent, their construction should not be adopted. *See Oatey Co.* 514 F.3d at 1277.

For these reasons, Defendants’ proposed construction of “programmable control unit”, which include terms such as “sound file” and “newly configured” would only serve to improperly limit the claim and confuse the jury and should be rejected. This term should be construed to simply mean “a device configured to accept user input” as proposed by Plaintiff.

### B. a transducer element ('395 Patent, Claim 4)

| Plaintiff's Construction | Defendants' Construction |
|---|---|
| "a component of a device that converts sound from an electronic signal" | "component that converts electrical energy to sound and sound to electrical energy."<br><br>For example, a component that converts electrical energy to electrical energy, like a transformer, is not a transducer element. |

Plaintiff submits that the term "a transducer element" means "a component of a device that coverts sound from an electronic signal." This term resides in claim 4 of the '395 Patent and appears in the element "a submersible device comprising a transducer element disposed within a watertight housing". ['395/20:39-40]. This construction will aid in the Court's and jury's understanding of this term and, unlike Defendants' proposed construction, is consistent with the '395 Patent's intrinsic and extrinsic evidence.

The '395 Patent makes repeated reference to a transducer device that functions as a speaker. ['395/4:32-34;10:8-29]. According to the specification, this transducer device includes various elements or components. ['395/10:12-18; FIGS. 4A & 4B]. Thus, the specification teaches that a transducer element is a component of the transducer device.

The transducer device described in the '395 includes the capability to operate as a speaker, which is a device that makes sound audible by converting sound from an electrical signal or electrical energy. Indeed, the '395 Patent specification makes clear that the goal of the '395 Patent is to enable users of products embodying the claimed inventions to attract and catch more fish by playing of the custom sounds underwater. Attracting fish in this manner requires presence of a speaker. While various embodiments discuss that the transducer device may also include components that allow it to function as a hydrophone to record underwater acoustics ['395/10:30-34], such a dual capability is not a requirement of the '395 Patent and such a requirement certainly finds no support in the language of independent claim 4.

Aside from the clear teaching of the specification that the transducer device of claim 4 acts as a speaker but need not act as a hydrophone, the doctrine of claim differentiation provides further support. In claim 1 of the '395 Patent, for example, a submersible device is recited that includes "a first transducer element" that is "selectively operable as either a speaker or a hydrophone". ['395/20:1-3]. Note there is no teaching in the '395 Patent that the transducer (and therefore its elements) must be able to simultaneously operate as a speaker and transducer. Thus, pursuant to the doctrine of claim differentiation, claim 1 recites a submersible device having dual capability as both a speaker and a hydrophone, while claim 4 only requires that the transducer function as a speaker. *See Saunders Grp., Inc. v. Comfortrac, Inc.*, 492 F.3d 1326, 1336 (Fed. Cir. 2007) ("the inclusion of the 'pressure activated seal' limitation in some claims and its omission from others, is a sufficiently powerful indicator" that the claim term encompassed devices without pressure active seals).

The dictionary definition of "transducer" further supports Plaintiff's construction. According to at least one dictionary, "transducer" means "a device for converting sound, temperature, pressure, light or other signals to or from an electronic signal". *See* Perrone Decl., Ex. A at BSX-001337-0013338.

Defendants' proposed construction is flawed in at least two ways. First, Defendants construe "transducer element" as the component that serves to convert energy to sound, rather than a component (or element) of such a device. As stated above, the '395 Patent refers to components or elements of the larger, submersible transducer device. ['395/10:15-24] In the language of claim 4 itself, the claim term "transducer element" in claim 4 is part of the submersible device in which it resides. The transducer element need not be the entirety of the submersible device.

Second, Defendants' proposed construction requires the submersible device to be a dual capability device that functions both as a hydrophone and as a speaker. Defendants' construction is bottomed on its construction of "transducer", which according to Defendants must act as both a speaker and a hydrophone. As discussed above, claim 4 does not lend itself to such a limited construction While the '395 Patent's claims such as 1 and 45, expressly recite limitations such as the transducer element being selectively operable to act as both a speaker and a hydrophone, claim 4 itself and the '395 Patent specification recite no such requirement. As such, claim 4 should not be construed in a manner that requires operation as both a speaker and a hydrophone. *See Saunders Grp., Inc.*, 492 F.3d at 1326 ("the inclusion of the 'pressure activated seal' limitation in some claims and its omission from others, is a sufficiently powerful indicator" that the claim term encompassed devices without pressure active seals).

Furthermore, claim 4 makes no reference to the relay of signals from the transducer to the control unit, as does claim 1. Instead, claim 4 refers to sets of sounds "to be played according to the user selected custom program via said submersible device". ['395/20:57-59]. As such, "transducer element" may be reasonably interpreted as a component of a device that converts sound from an electronic signal (such as a speaker). *See Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1277 (Fed. Cir. 2008) ("[W]here claims can reasonably [be] interpreted to include a specific embodiment, it is incorrect to construe the claims to exclude that embodiment, absent probative evidence on the contrary.").

Defendants' proposed construction ignores the various embodiments described in the specification in which the transducer device, which includes transducer elements, operates as a speaker but *may* operate as a hydrophone. Nowhere in the '395 Patent is this transducer device characterized as being only a hydrophone or other device that can record sounds. Defendants' overly restrictive construction that the transducer device *must* include both capabilities is contrary to the claim language itself and the teachings of the '395 Patent and should be rejected. *See*

*Innova/Pure Water, Inc. v. Safari Water Filtration Sys.*, 381 F.3d 1111, 1117 (Fed. Cir. 2004) ("[E]ven where a patent describes only a single embodiment, claims will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope . . . .") (internal quotation marks and citation omitted). In view of the foregoing, the construction of "a transducer element" advanced by Plaintiff should be adopted.

### C. A watertight housing ('395 Patent - Claim 4)

| **Plaintiff's Construction** | **Defendants' Construction** |
|---|---|
| "an enclosure for preventing water from entering" | "a frame or box for containing something, the frame or box being so snugly put together that no water can get in or through" |

Plaintiff proposes "an enclosure for preventing water from entering" as its construction of the term "watertight housing". The term "watertight housing" appears in the clause "a submersible device comprising a transducer element disposed within a watertight housing" found in claim 4. The '395 Patent specification makes repeated reference to a watertight or waterproof housing. ['395/4:28-31; 10:15-23]. Plaintiff proposes a simple definition of this term, based in large part on its simple definition of "housing". This construction is supported by the specification of the '395 Patent, which does not provide a limiting definition of "waterproof housing" (as suggested by Defendants). The '395 Patent depicts an arrangement of the submersible device (i.e., an underwater speaker) that includes an outer enclosure that surrounds the various components of the transducer device. ['395/FIGS. 4A & 4B]. As shown in Figure. 4B of the '395 Patent, for example, within the case that surrounds the components of the transducer device, including a transformer, is polyurethane that occupies voids within the enclosure.

The purpose of making the housing in which some of the speaker parts reside watertight is to prevent damage to the electronics within the speaker and prevent the speaker from being rendered inoperable upon exposure of its various components to water.

Plaintiff's proposed construction is also consistent with the dictionary definition of the term "housing". Meriam Webster defines "housing" as "something that covers or protects, such as *a*: a casing or enclosure." *See* Perrone Decl., Ex. B at BSX-001339.. The construction offered by Plaintiff fits squarely within this definition. Since Plaintiff's proposed construction of this term as "an enclosure for preventing water from entering" is entirely consistent and supported by the '395 Patent specification and the extrinsic evidence, Plaintiff's construction of this terms should be adopted.

Defendants propose a construction that imports specific shapes and structure into the term "housing". According to Defendants, a housing must be "a frame" or "box" that is "so snugly put together that no water can get in or through". This construction, once again, is the product of Defendants attempting to rewrite the claims by importing terms that find no support in the specification. The '395 Patent specification does not include the term "box" or "frame". In fact, the embodiment of the transducer device depicted in Figure 4B of the '395 Patent, shown above, is not a box but is cylindrical in shape. Thus, the only figures which depict a transducer device in detail do not show a box. Moreover, it is difficult to understand how a "frame" can be "so snugly constructed" so as to prevent water from entering. Nevertheless, there is no teaching in the '395 Patent of a specific "frame" or "box" or other structure that is the only structure that must be employed to prevent water from entering a particular area of the speaker or coming into contact with a particular speaker component.

The watertight or waterproof nature of the speaker may be achieved in a variety of ways, with only two shown in Figures 4A and 4B. Even if the embodiment depicted in Figure 4B were the only embodiment of a watertight housing described in the patent, limiting the claim to that embodiment is improper. *See Innova/Pure-Water*, 381 F.3d at 1117 ("[E]ven where a patent describes only a single embodiment, claims will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope . . . .") (internal quotation marks and citation omitted). The patent applicants made no clear disavowal of subject matter relating to "watertight housing" during prosecution of the '395 Patent and the '395 Patent includes no special definition of "watertight housing" that would support such a limiting construction. *See Ericsson*, 161 F. Supp. at 446, 2015 U.S. Dist. LEXIS 179421 at *20 (citing *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1329 (Fed. Cir. 2009)(statements in specification or file history that amount to disavowal or disclaimer of full claim scope must be "clear and unmistakable"). Since Plaintiff did not clearly limit the meaning of the term "watertight housing" through a special definition in the specification or disavowal during prosecution of the '395 Patent, Defendants' proposed construction of this term should be rejected and the Court should adopt Plaintiff's proposed construction.

**D. custom program ('395 Patent – Claims 4 and 13)**

| **Plaintiff's Construction** | **Defendants' Construction** |
|---|---|
| "a specialized program" | "instructions specifying the operations to be performed for playing a made to order, newly configured combination of sets of digitally prerecorded sounds, which contains more instructions than playing a single sound file at a single volume (i.e. a 'normal' program)."<br><br>For example, a custom program could be: (1) playing every sound file in a list (i.e., Play All); (2) playing two or more sound files in a specified sequence (i.e., Select Sequence); or (3) playing a single sound file at a single or variable volume with a specified delay (i.e., Play Selected Single Sound). |

To the extent the term "custom program" requires a construction at all, Plaintiff submits that the term simply means "a specialized program". The term "custom program" appears in claims 4 and 13 of the '395 Patent. In claim 4, the term "custom program" is introduced within the "programmable control unit" element and specifically in the context of the claimed "input device". Claim 4 recites an input device having a "user interface comprising a plurality of user-selectable options" including "sets of digitally prerecorded sounds, sequence and volume for user selection of a custom program." ['395/20:49-55]. Thus, selection of a custom program in claim 4 arises in the context of the user interface.

The '395 Patent specification discloses numerous modes of operation. These various modes of operation provide users with great flexibility and functionality through the various user-selectable options available to the user via the control unit. In Custom Mode, the user may select various modes of operation. These include "play all" mode ['395/15:7-9], "select sequence mode" ['395/15:30-34], "play selected sound" mode ['395/16:1-6],, and "sound sweep" mode ['395/15:47-67],. In "play all" mode, all available sounds may be queued and played. In this mode, the user may select a volume setting for play back as well as a delay setting for setting a delay period between playing of one sound and another. ['395/15:7-15].

In "select sequence" mode, the user may select individual sounds to be played in a selected order. In this mode the user may also select a volume level for playback of each sound and further order the sounds for playback by setting a delay period between sounds. ['395/15:31-47].

In "play selected sound" mode the user may select an individual sound to be played repeated and variably control the volume level at which the sound is played. ['395/16:1-6]. The user may also further order the playback of the sound by inserting a delay period between iterations of playing the sounds. ['395/16:6-7]. The user may also activate "single volume mode" for each iteration of playing the sound. ['395/16:18-20]. These variations of the custom playback modes may be customized at the factory. [*See* '395/3:5-9]. As the '395 Patent specification teaches "the above preset or programmable operations for configuring custom settings for volume level and sound selections are equally operable for configuring custom playback delays or playback intermittency…." ['395/3:15-18].

Another custom mode available to the user is "sound sweep" mode. In this mode, any set of multiple sounds can be programmed for playback in a first to last order or last or first order as listed on sound file selection menus. ['395/15:48-51]. Or, the user may program any specific order for playback of sounds. ['395/15:52-53]. In addition, a user may select factory preset sounds that are linked in sequence for playback at factory preset or user programmed volume levels known to be most effective for the particular sound in a particular environment. ['395/15:53-58]. These factory preset links of multiple sounds are set for playback at specific time durations that are shown to be optimally effective for those specific sounds. ['395/15:57-60]. According to the specification, "sound sweep" mode, "is a significant improvement over the prior art which shows no such functionality and which is not as effective or efficient for maximizing fish attraction which these functions provide due to critical need for customizing volume and sound settings for determining most effective one under varying conditions, diverse field locations, and as applied to specific fish and other marine and aquatic species." [395/15:60-67]. In sound sweep mode, therefore, the user through the user interface may make a selection of a preset arrangement of sounds in a particular sequence and volume specially created at the factory that is most effective for attracting and stimulating fish. This selection, therefore, is of a custom or specialized program. Accordingly, the term "custom program" should be construed to mean "a specialized program".

Defendants contend that "custom program" means

> instructions specifying the operations to be performed for playing a made to order, newly configured combination of sets of digitally prerecorded sounds, which contains more instructions than playing a single sound file at a single volume (i.e. a 'normal' program). For example, a custom program could be: (1) playing every sound file in

> a list (i.e., Play All); (2) playing two or more sound files in a specified sequence (i.e., Select Sequence); or (3) playing a single sound file at a single or variable volume with a specified delay (i.e., Play Selected Single Sound).

As expected, Defendants propose a lengthy construction that imports numerous limitations into the claim and otherwise limits the claim in a manner that excludes various embodiments described in the patent. Absent a clear disavowal of claim scope, such a construction is improper. *See Oatey,* 514 F.3d at 1277 ("[W]here claims can reasonably [be] interpreted to include a specific embodiment, it is incorrect to construe the claims to exclude that embodiment, absent probative evidence on the contrary."); *Ericsson*, 161 F. Supp. at 446, 2015 U.S. Dist. LEXIS 179421, *20 (E.D. Tex. 2015)(citing *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1329 (Fed. Cir. 2009)(statements in specification or file history that amount to disavowal or disclaimer of full claim scope must be clear and unmistakable).

Defendants' proposed construction is flawed on at least two fronts. First, Defendants submit that the combination of sets of digitally prerecorded sounds must be "made to order" and "newly configured". One problem with this limiting construction is that it excludes the embodiments discussed above in which a user may select factory preset sounds linked in a sequence and set at particular volume levels that are found by the manufacturer to be the most effective in attracting and stimulating fish. User selection of a custom program that is based on factory presets in this manner, which is described in the '395 Patent specification as a custom mode of the system, would perhaps not be a "made to order" and "newly configured combination" of sets of digitally prerecorded sounds. Since Defendants' proposed construction excludes the many ways in which the sequencing and volume settings of sounds for playback may be selected by the user, their proposed construction should be rejected.

Second, Defendants essentially limit their construction by precluding playing of a "single sound file at a single volume level." One problem here is that the term "single sound file", according to its plain and ordinary meaning could include one file containing multiple sounds. As such, this "single sound file" could encompass the factory preset linked sounds set at a particular volume that the '395 Patent describes as a custom mode of operation. Curiously, Defendants' list of examples excludes the sound sweep custom mode described above. Defendants also attempt to qualify this limiting language with the qualification "(i.e., a 'normal" program)" without explaining what is meant by "a normal program". A "single sound file" could be a custom program, depending upon the contents of that sound file. This is another example of Defendants improperly attempting to narrow the claim terms, in this case by essentially importing a negative limitation into the claim where a clear and unmistakable disavowal of claim scope that would support such a negative limitation was not made. *See Ericsson*, 161 F. Supp. at 446, 2015 U.S. Dist. LEXIS 179421, *20 (E.D. Tex. 2015)(citing *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1329 (Fed. Cir. 2009)(statements in specification or file history that amount to disavowal or disclaimer of full claim scope must be clear and unmistakable). For these reasons, the Court should decline to adopt Defendants' proposed construction of "custom program" and adopt Plaintiff's proposed construction.

### E. "sets of digital sounds" or "sets of digitally prerecorded sounds" ('395 Patent – Claim 4 and 13)

| Plaintiff's Construction | Defendants' Construction |
|---|---|
| Both terms have the same meaning.<br><br>"a group of digitally prerecorded sounds" | Both terms have the same meaning.<br><br>"a group of digital sounds, but which is not, by itself, a custom program"<br><br>For example, a group of digital sounds may contain a variety of different sounds, but each individual group of digital sounds is a "set of digital sounds"/"set of digitally prerecorded sounds". |

Plaintiff proposes a construction of the phrase "sets of digital sounds" or "sets of digitally prerecorded sounds" to mean "a group of digitally prerecorded sounds". The parties agree that these terms have the same meaning. Plaintiff's proposed construction of this term is consistent with the various embodiments in the specification in which a user has the ability to select through the user interface multiple sounds for playback via the underwater speaker. For example, in custom mode a user may select multiple (a group) of sounds linked at the factory in a sequence and at a volume determined to be the most effective in attracting and stimulating fish. ['395/15:53-60]. This construction is consistent with the dictionary definition of "sets", which according to Meriam-Webster means "a collection of things belonging, issued, used, or growing together." *See* Perrone Decl., Ex. C at DEFS 0000371. Thus, the term "sets of digitally prerecorded sounds" means a group of digitally prerecorded sounds.

Defendants once again attempt to improperly limit the claim. This time Defendants submit that the group of digital sounds is not, by itself, a custom program. Defendants' proposed construction cannot be reconciled with the claim language itself and the disclosure of the '395 Patent specification.

Like many of the claim terms at issue, this term appears in claim 4 in the "input device" element in the context of options that a user may select for selecting a custom program. As the plain language of claim 4 makes clear, the options that a user may select include sets of digitally prerecorded sounds, sequence and volume. There is nothing in the language of claims 4 and 13, however, that the group of sounds that a user may select may not be a custom program. Furthermore, as discussed at length above in connection with the construction of "custom program", the specification includes embodiments within the custom mode of operation in which the user may select factory preset groups of sounds, which are linked in sequence a manner that provides the most effective means for attracting and stimulating fish. These "sound sweeps" may also be preset at a particular volume for optimal performance. The '395 Patent contemplates numerous ways in which a user may select a custom program and no clear disavowal was made that precludes the sets of digital prerecorded sounds from being a custom program. Accordingly, the Court should decline to adopt Defendants' proposed construction of this term and adopt Plaintiff's proposed construction.

### F. An underwater transducer device/underwater transducer (''395 Patent – Claim 13)

| Plaintiff's Construction | Defendants' Construction |
|---|---|
| No construction necessary. Plain and ordinary meaning. | Both terms have the same meaning.<br><br>"A device underwater that includes a watertight housing and a component that converts electrical energy to sound and sound to electrical energy." |

No construction for this term is necessary because its plain and ordinary meaning is clear. In construing a disputed claim term, the term is given its "ordinary and customary meaning," which "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). This "provides an objective baseline from which to begin claim interpretation," because "patents are addressed to and intended to be read by others of skill in the pertinent art." *Id.*

The parties have submitted proposed constructions of "transducer element". Section III, B, *supra.*. Regardless of which construction of transducer is adopted, there is no need to separately construe the term "underwater transducer." Defendants construe "transducer" in "underwater transducer device" in the exact same manner they construe "transducer element." Thus, for this term Defendants are simply construing the term "underwater." Defendants propose an underwater device as a "device underwater that includes a watertight housing." As can be seen, when

Defendants construction for an underwater device is boiled down, the proposed construction is a "device underwater that includes a watertight housing." They construe underwater device as a device underwater plus additional language. If the term "underwater" requires a separate construction, why use the same term "underwater" in its construction? If a jury cannot understand underwater standing alone, then how will they understand the term underwater in the construction? The reason is clear. Defendants are using the construction to import unnecessary and unrequired limitations into the construction, namely a watertight housing. Even if the jury is instructed to apply Defendants' construction, the jury will still have to apply a plain and ordinary meaning of the term "underwater" within the construction. If the jury can apply a plain and ordinary meaning of the term "underwater" in Defendants' construction, then they can apply the plain and ordinary meaning to the term "underwater transducer device." As such, Defendants' proposed construction does nothing to aid the jury and there is no need to separately construe this claim term.

Defendants' construction also seeks to read many limitations into the claims. For example, Defendants construction for "underwater transducer" includes a "watertight housing." However, the term "watertight housing", which is being construed separately, is not present in the claim; the claim never recites a watertight housing. Claim 4 recites a watertight housing, but claim 13, which uses the claim term "underwater transducer" does not require a watertight housing. Thus, Defendants are trying to transform claim 13 into claim 4 by importing missing limitations. The patent applicants knew of the term "watertight housing" and but did not use it in claim 13. Defendants cannot rewrite claim 13 by including this limitation.

Interestingly, Defendants separately proposed the following construction for "watertight housing": "a frame or box for containing something, the frame or box being so snugly put together that no water can get in or through." *See* Section III, C, *supra.* Here again, Defendants are importing the limitation of a frame or box into claim 13. Claim 13 does not recite a frame or box and does not recite a housing at all. Yet Defendants assert that the term "underwater transducer" should be limited to a housing comprising a frame or box, when none of these limitations are included in the claim. As noted above, neither frame nor box are even mentioned in the specification. To illustrate, Defendants have taken the term "underwater" and construed and extrapolated the term to be limited to a housing that has a frame or box, among other limitations. There is no need for this mental gymnastics and rewriting of the claim. The claim does not require an underwater housing and Defendants' proposed construction rewrites the claim to require such a specific type of housing as a frame or a box.

As further proof that Defendants construction is unnecessarily limiting, claim 33 further recites an "underwater sensing device." Because Defendants have proposed to construe "underwater" as a watertight housing, which has been construed as a frame or box for containing something, the frame or box being so snugly put together that no water can get in or through a frame or box, the same construction should be applied to "underwater sensing device." Thus, underwater sensing device would be, according to Defendants' construction, "a device underwater that includes a watertight housing" which is so snug that water cannot get in or through. This construction falls apart when viewing dependent claims which further define "underwater sensing device." Claim 40, for example, states that the underwater sensing device is a pH meter. A pH meter must necessarily touch the water to measure the pH. As such, the pH sensor cannot be watertight as required by Defendants' construction. Therefore, the term "underwater" cannot be construed only as a watertight housing as suggested by Defendants.

Defendants' construction of the term "transducer" is likewise unnecessarily narrow for the reasons discussed above. Defendants once again construe transducer as a transducer that both produces and records sound. For the reasons stated above, such a construction is unnecessarily limiting. Accordingly, , this claim term should not be construed as proposed by Defendants and the plain and ordinary meaning should control.

### G. Specified sequence ('395 Patent, Claims 4 and 13)

| **Plaintiff's Construction** | **Defendants' Construction** |
|---|---|
| No construction necessary. Plain and ordinary meaning. | "sequence entered by the user of two or more sound files"<br><br>For example, selection as described in the "Select Sequence" mode. However, playing a single sound file is outside the scope of the claim." |

No construction for this term is necessary because its plain and ordinary meaning is clear. In construing a disputed claim term, the term is given its "ordinary and customary meaning," which "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). This "provides an objective baseline from which to begin claim interpretation," because "patents are addressed to and intended to be read by others of skill in the pertinent art." *Id.* Defendants cannot identify any lexicography, disclaimer, or disavowal for "specified sequence." Consequently, the plain and ordinary meaning of the term should control.

Defendants are again inserting limitations, which are not present otherwise present into the claims. Nevertheless, Defendants' proposed construction of "specified sequence" limits the term to selection of "sound files." The context of the usage of this claim term in claim 4 is instructive. Claim 4 reads, in part, as follows:

> an input device including a user interface comprising a plurality of user-selectable options including said sets of digitally prerecorded sounds, sequence and volume for user selection of a custom program including one or more sets of digitally prerecorded sounds in a specified sequence and at a specified volume. . . .

This portion of the claim pertains to an input device. The user can select a custom program which includes one or more sets of digitally prerecorded sounds. Defendants' construction imports the limitation of two or more sound files. Reading this construction into the claim makes no sense. The claim would read as follows: ". . .an input device including a user interface comprising a plurality of user-selectable options including said sets of digitally prerecorded sounds, sequence and volume for user selection of a custom program including one or more sets of digitally prerecorded sounds in a sequence entered by the user of two or more sound files [specified sequence] and at a specified volume. . . ." To which sound files is this claim referring? Are the two or more sound files the same or different than the set of digitally prerecorded sounds? Needlessly introducing these unsupported terms into the claim adds more confusion than clarity. The claim was never limited to two or more sound files. Therefore, importing the term "sound files" into the term "specified sequence" is an improper construction.

As noted, Defendants' construction centers on the term "sequence." However, Defendants construction of "sequence" includes the term sequence. If the term sequence is so confusing such that it should be construed, why use the term sequence in the construction of sequence? If a jury is unable to understand the term "sequence" then how will they understand the construction which includes the term sequence? Presumably the jury will be tasked with applying the plain and ordinary meaning of the term sequence. If the jury can apply the plain and ordinary meaning to the term sequence in Defendants' construction of "sequence entered by the user of two or more sound files" they can certainly apply the plain and ordinary meaning to the term "specified sequence." This serves as additional proof that the term "specified sequence" need not be construed; the proposed construction does nothing to aid the jury and still requires that the jury apply the plain and ordinary meaning.

Defendants' construction also includes an express exclusion. According to Defendants "playing a single sound file is outside the scope of the claim." Defendants' are asserting there is a clear disavowal of playing a "single sound file." However, any disclaimer or disavowal must be clear. To disavow or disclaim the full scope of a claim term, the patentee's statements in the specification or prosecution history must amount to a “clear and unmistakable” surrender. *See Ericsson Inc.*, 161 F. Supp. 3d at 446, 2015 U.S. Dist. LEXIS 179421, *20 (E.D. Tex. 2015)(citing *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1329 (Fed. Cir. 2009). Patentee made no such disclaimer or disavowal, and Defendants are unable to point to any such disclaimer which would amount to a “clear and unmistakable” surrender. Patentee never stated that playing a single sound file is outside of the scope of the claim. In fact, as noted, the term “sound file” is not defined or limited in the specification. Accordingly, no statement can be deemed a clear and unmistakable surrender.

Defendants’ construction, specifically the exclusion, states playing a single sound file cannot be a sequence. Rather, a sequence, Defendants suggest, is limited to two or more dissimilar files. However, the extrinsic evidence relied upon by Defendants challenges Defendants’ construction. Defendants’ own extrinsic evidence includes a definition of sequence which reads “a continuous or related series, often of uniform things.” Webster’s New World College Dictionary (3d ed. 1997)(“sequence”). *See* Perrone Decl. at Ex. C at DEFS 0000368.This definition, cited by Defendants, suggests that a sequence can include uniform things, such as a single sound file.

Furthermore, Defendants’ construction renders one or more claims superfluous. Defendants’ construction expressly excludes playing a single sound file. While Plaintiff is uncertain as to the meaning of sound file, claim 14 clearly provides for the situation of a “delay period between one or more sets of digitally prerecorded sounds. . . .” The menu further includes the selection of a predetermined “delay period between the one or more sets of digitally prerecorded sounds.” Claim 14 contemplates a delay between one or more sets of digitally prerecorded sounds. A single sound file can arguably contain one set of digitally prerecorded sounds. Thus, claim 14 contemplates a delay between **one or more** sound files. By the canons of construction, claim 14 is necessarily narrower than claim 13. *See Alcon Research, Ltd. v. Apotex Inc.*, 687 F.3d 1362, 1367 (Fed. Cir. 2012) ("A dependent claim narrows the claim from which it depends.") Consequently, claim 13 includes the possibility of a delay between one or more sound files. This precludes Defendants' exclusion in their construction. For these reasons, Defendants' construction should not be adopted and the plain and ordinary meaning of the term "specified sequence" should control.

### H. User selectable options including . . . sequence ('395 Patent – Claims 4 and 13)

| **Plaintiff's Construction** | **Defendants' Construction** |
|---|---|
| No construction necessary. Plain and ordinary meaning. | "option that allows a user to select the sequence of two or more sets of digitally prerecorded sounds to be played" |

No construction for this term is necessary because its plain and ordinary meaning is clear. In construing a disputed claim term, the term is given its "ordinary and customary meaning," which "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). This "provides an objective baseline from which to begin claim interpretation," because "patents are addressed to and intended to be read by others of skill in the pertinent art." *Id.* Defendants cannot identify any lexicography, disclaimer, or disavowal for "sequence." Consequently, the plain and ordinary meaning of the term should control.

Defendants have suggested construing only a portion of the phrase in the claim. The entirety of the phrase reads as follows: "user-selectable options including a selection of a plurality of sets of digitally prerecorded sounds, sequence and volume." The clause makes clear that the options can include 1) a selection of a plurality of sets of digitally prerecorded sounds, 2) sequence, and 3) volume. Inextricably, Defendants have opted to only construe selected portions of the claim term.

Thus, the proposed construction only focuses on sequence.

Defendants have construed the "user selectable options" as "option that allows a user to select." Removing "user selectable options" from the term "user selectable options including . . . sequence" leaves only "sequence" to be construed. Defendants then construe sequence as "the sequence of two or more sets of digitally prerecorded sounds to be played." Thus, Defendants construction of "sequence" includes the term sequence. As before, if the term sequence is so confusing such that it should be construed, why use the term sequence in the construction of sequence? Put differently, if sequence standing alone does not provide its meaning to one of ordinary skill, why does "sequence" with additional limitations provide meaning to one of ordinary skill? The answer is that Defendants are, again, using claim construction to import otherwise missing limitations into the claim. As noted above, the claim discloses an input device having a user interface comprising user-selectable options. These options include 1) a selection of a plurality of sets of digitally prerecorded sounds, 2) sequence, and 3) volume. Defendants are trying to import the limitations of option 1 into option 2. Such a construction is unsupported by the specification or file history. Further, such a construction offers no additional guidance to the jury. By using sequence in the construction of sequence, Defendants' proposed construction offers more confusion than guidance.

The proposed construction makes no sense in the context of the claim. The claim already includes a selection of a plurality of sets of digitally prerecorded sounds. Why do Defendants propose that sequence further includes the redundant limitation of "two or more sets of digitally prerecorded sounds to be played." This redundancy renders other claim language superfluous. Accordingly, Defendants' proposed construction should not be adopted and the plain and ordinary meaning of the term should apply.

### I. prerecorded ('395 Patent – Claims 4 and 13)

| Plaintiff's Construction | Defendants' Construction |
|---|---|
| "recorded previously" | "recorded previously" |

Plaintiff and Defendants agree that the term "prerecorded" should be construed as "recorded previously." The prefix "pre" indicates that the action took place prior or previously. Accordingly, the Parties submit and agree the term prerecorded should be construed as "recorded previously."

## IV. CONCLUSION

For the foregoing reasons, Plaintiff Biosonix respectfully requests that the Court construe the claims or apply the plain and ordinary meaning of the disputed claim terms as proposed by Plaintiff.

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Respectfully submitted,
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## CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) and served via the Court's electronic filing system on all counsel who have consented to electronic service on this the 6th day of October, 2016.

*/s/Gregory Perrone*
Gregory Perrone